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3 **IN THE UNITED STATES DISTRICT COURT**  
4 **FOR THE DISTRICT OF ARIZONA**  
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6 Karen Malherek,

7 Plaintiff,

8 v.

9 Commissioner of Social Security  
10 Administration,

11 Defendant.

No. CV-18-00409-TUC-CKJ

**ORDER**

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13 Presently before the Court is Plaintiff's Motion for Reconsideration (Doc. 21). For  
14 the following reasons, Plaintiff's Motion is DENIED, and this case remains CLOSED.

15 **PROCEDURAL HISTORY**

16 On August 16, 2018, Plaintiff filed a complaint appealing the administrative  
17 decision of the Commissioner of Social Security Administration which denied her claim of  
18 disability benefits. (Doc. 1) On November 9, 2018, the Commissioner filed her answer  
19 and a copy of the administrative record. (Doc. 11, 12) On June 5, 2019, after briefing by  
20 the parties, Magistrate Judge Thomas Ferraro issued his Report and Recommendation  
21 ("R&R") (Doc. 16). In his R&R, Magistrate Judge Ferraro recommended that the Court  
22 affirm the decision of the Administrative Law Judge ("ALJ") and deny Plaintiff's appeal.  
23 *Id.* On June 19, 2019, Plaintiff filed her objections to the R&R outlining five arguments  
24 why the Court should reject the Magistrate Judge's recommendation. (Doc. 17) On  
25 September 26, 2019, after analyzing Plaintiff's objections to the R&R, the Court adopted  
26 the recommendations of Magistrate Judge Ferraro and denied Plaintiff's claims. (Doc. 19)  
27 On October 24, 2019, Plaintiff filed her Motion for Reconsideration and memorandum in  
28 support thereof. (Doc. 21, 22) This Order follows.

## LEGAL STANDARD

“Although [Federal Rule of Civil Procedure] 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks and citation omitted). “A motion for reconsideration under Rule 59(e) ‘should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.’ ” *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (emphasis added) (citing *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)). “Courts have generally not defined what constitutes ‘clear error’ under Rule 59(e).” *Piper v. U.S. Dep’t of Justice*, 312 F. Supp. 2d 17, 21 (D.D.C. 2004) (internal citation omitted). “Given that lack of definition . . . courts routinely look to the ‘clearly erroneous’ standard invoked in the context of the law of the case doctrine.” *Teamsters Local 617 Pension and Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 231 (D. Ariz. 2012). “To be clearly erroneous, a decision must strike [a court] as more than just maybe or probably wrong; it must be dead wrong.” *Hopwood v. Texas*, 236 F.3d 256, 272-73 (5th Cir. 2000).

Additionally, “[a] motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotation marks and citation omitted). “[A] party raising arguments or presenting evidence for the first time when they could reasonably have been raised earlier in the litigation raises the concern that it has abused Rule 59(e).” *Teamsters Local 617*, 282 F.R.D. at 220. “Ultimately, a party seeking reconsideration must show more than a disagreement with the Court’s decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party’s burden.” *Cachil Dehe Band of Wintun Indians v. California*, 649

1 F. Supp. 2d 1063, 1070 (E.D. Cal. 2009) (internal quotation marks and citation omitted).

2 As it relates to motions for reconsideration, the Local Rules of this District also offer  
3 guidance. They instruct:

4 (1) Form and Content of Motion. The Court will ordinarily  
5 deny a motion for reconsideration of an Order absent a showing  
6 of manifest error or a showing of new facts or legal authority  
7 that could not have been brought to its attention earlier with  
8 reasonable diligence. Any such motion shall point out with  
9 specificity the matters that the movant believes were  
10 overlooked or misapprehended by the Court, any new matters  
11 being brought to the Court's attention for the first time and the  
12 reasons they were not presented earlier, and any specific  
13 modifications being sought in the Court's Order. *No motion for  
reconsideration of an Order may repeat any oral or written  
argument made by the movant in support of or in opposition to  
the motion that resulted in the Order.* Failure to comply with  
this subsection may be grounds for denial of the motion.

14 (2) Procedure. No response to a motion for reconsideration and  
15 no reply to the response may be filed unless ordered by the  
16 Court, but no motion for reconsideration may be granted unless  
17 the Court provides an opportunity for response. *Absent good  
cause shown, any motion for reconsideration shall be filed no  
18 later than fourteen (14) days after the date of the filing of the  
Order that is the subject of the motion.*

19 LRCiv 7.2(g) (emphasis added).

## 20 ANALYSIS

21 In Plaintiff's Motion for Reconsideration, she raises two arguments for this Court  
22 to consider: (i) the Court erred when it held that a mental impairment that is not "severe"  
23 cannot impact a claimant's ability to perform "semi-skilled" work; and (ii) the Court erred  
24 when it held that a claimant's mild mental limitations need not be included in an ALJ's  
25 RFC assessment when at issue is the claimant's ability to perform work more demanding  
26 than "unskilled" work. (Doc. 22)

### 27 I. Plaintiff's Motion is Untimely

28 As a preliminary matter, the Court notes that Plaintiff's Motion is untimely and

procedurally barred from review. *See Cunningham v. Weston*, 180 F. App'x 644, 647 (9th Cir. 2006) (affirming district court denial of motion for reconsideration for failing to adhere to local rule filing deadline). The Court issued its order adopting Magistrate Judge Ferraro's R&R on September 26, 2019. (Doc. 19) Plaintiff filed her Motion for Reconsideration and corresponding memorandum of law twenty-eight days later, on October 24, 2019. (Doc. 21, 22) The Local Rules dictate that "any motion for reconsideration shall be filed no later than fourteen (14) days after the date of the filing of the Order that is the subject of the motion." LRCiv. 7.2(g). That said, Plaintiff's motion is 13 days overdue. Accordingly, her Motion is DENIED.

## **II. Plaintiff Presents Duplicative Arguments**

Notwithstanding the untimeliness of Plaintiff's Motion, the Court also finds Plaintiff's argument that the Court erred in holding that Plaintiff's mental limitations need not be included in an RFC assessment when her ability to perform work more demanding than unskilled work was at issue is duplicative. Conspicuously, Plaintiff made the identical argument in her objection to the R&R. She stated:

The Magistrate Judge recommended holding that the ALJ reasonably found [Plaintiff's] mild mental limitations . . . no longer existed when the ALJ determined [Plaintiff's] residual functional capacity between steps three and four of the sequential evaluation . . . The Magistrate Judge recommended that the Court rely on the ALJ's assertion that she considered [Plaintiff's] severe and non-severe impairments in combination. That assertion is not rational explanation for the disappearance of [Plaintiff's] mild mental limitations when her residual functional capacity was determined. The Court should reject Magistrate Judge's recommendation to hold that recognized mild mental limitations need not be accounted for in an ALJ's residual functional capacity assessment when at issue is semi-skilled work.

(Doc. 17 at 9) (internal citations omitted).

In its Order adopting the R&R, the Court observed:

1 Plaintiff's argument is solely predicated upon the fact that the  
 2 ALJ did not specifically mention her mild mental limitation  
 3 when determining her RFC. *However, the ALJ explicitly stated*  
 4 *that all the Plaintiff's impairments were considered when*  
 5 *determining her RFC.* The ALJ did not err by electing not to  
 6 devote a specific section to discuss Plaintiff's mild mental  
 7 impairment in her RFC. *An ALJ is required only to discuss and*  
 8 *evaluate the evidence that supports his or her conclusion; it*  
 9 *does not specify that the ALJ must do so under [a specific]*  
 10 *heading.*

11 (Doc. 19 at 7) (emphasis added) (internal quotation marks and citations omitted).  
 12 Accordingly, the Court will not entertain—for the second time—Plaintiff's argument that  
 13 the ALJ failed to account for Plaintiff's mental limitations in her RFC assessment, and the  
 14 duplicative claim is DENIED.

### 15 **III. Plaintiff Misstates the Court's Conclusion**

16 The Court finds that Plaintiff's assertion that "[t]he Court clearly erred when it held  
 17 that a mental impairment that is not 'severe' at step two of the sequential evaluation cannot  
 18 impact a claimant's ability to perform 'semi-skilled' work," is misguided, at best. In the  
 19 Court's September 26, 2019 Order, it observed:

20 [E]ven if the ALJ had neglected to include Plaintiff's mild  
 21 mental limitation in her RFC analysis, that error would be  
 22 harmless. Plaintiff's argument is only that the ALJ did not  
 23 discuss her mild mental limitation, not that her mild mental  
 24 limitation would prevent her from performing work as a  
 25 medical records clerk or receptionist. Plaintiff lodged no  
 26 objection to the ALJ's determination of her depression as "non-  
 27 severe." *A non-severe limitation by its very definition has*  
 28 *nothing "more than a minimal limitation" on Plaintiff's ability*  
*to do basic work activities.* Furthermore, a mild mental  
 limitation can present no significant interference with the  
 ability to perform basic work-related activities. Ultimately, any  
 error that does not affect the ALJ's conclusion is harmless.

(Doc. 19 at 7-8) (emphasis added) (internal quotation marks and citations omitted).

Plaintiff attempts to refute the Court's conclusion by arguing (sans supporting

1 caselaw), “the fact that [Plaintiff] does not have a ‘severe’ mental impairment . . . does not  
2 mean that her mental impairment . . . cannot diminish her ability to perform more  
3 demanding ‘semi-skilled’ work.” (Doc. 22 at 7) In essence, Plaintiff argues that a non-  
4 severe mental impairment can affect and/or diminish her ability to perform semi-skilled  
5 labor. The Court does not disagree with this assertion; and its observation that “[a] non-  
6 severe [mental] limitation . . . has nothing more than a minimal limitation on Plaintiff’s  
7 ability to do basic work activities,” (Doc. 19 at 7) does not contradict Plaintiff’s claim that  
8 her mental limitations affect her ability to perform semi-skilled labor.

9 Magistrate Judge Ferraro and the Court correctly noted that the ALJ considered  
10 Plaintiff’s mental limitations when assessing her RFC. (Doc. 16 at 11-12; Doc. 19 at 7)  
11 Moreover, not only did Plaintiff fail to object to the ALJ’s determination that her mental  
12 limitations were “non-severe,” she even went so far as to testify that “I don’t think the  
13 depression [prevented] me from working in 2012 . . . . It was just the pain and that it makes  
14 me very unreliable[,]” at her administrative hearing (Doc. 12-3 at 72-73). Plaintiff fails to  
15 provide any substantive caselaw or argument that indicates that an ALJ must disregard  
16 Plaintiff’s direct testimony during her disability hearing. In his R&R, Magistrate Judge  
17 Ferraro reiterated:

18  
19 The ALJ is responsible for determining credibility, resolving  
20 conflicts in medical testimony, and for resolving  
21 ambiguities . . . The court may overturn the decision to deny  
22 benefits only when the ALJ’s findings are based on legal error  
23 or are not supported by substantial evidence in the record as a  
24 whole.

25 (Doc. 16 at 5) (internal quotation marks and citations omitted).

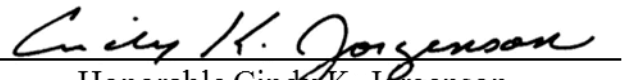
26 The Court finds the ALJ correctly determined credibility, resolved conflicts in  
27 medical testimony and ambiguities, and supported his findings with substantial evidence  
28 found in the record as a whole. Plaintiff fails to demonstrate the Court’s legal analysis  
and/or conclusions were “clearly erroneous” or “dead wrong.” Accordingly, Plaintiff’s  
Motion for Reconsideration on this argument is DENIED, and this case remains CLOSED.

1 IT IS ORDERED:

- 2 1. Plaintiff's Motion for Reconsideration (Doc. 21) is DENIED.
- 3 2. This case remains CLOSED.
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6 Dated this 7th day of July, 2020.

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8   
9 Honorable Cindy K. Jorgenson  
10 United States District Judge

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